Case C-303/22

Request for a preliminary ruling

Date lodged:

9 May 2022

Referring court:

Krajský soud v Brně (Czech Republic)

Date of decision to refer:

5 May 2022

Applicant:

CROSS Zlín a.s.

Defendant:

Úřad pro ochranu hospodářské soutěže

ORDER

The Krajský soud v Brně (Brno Regional Court, Czech Republic) has ruled […] in the case of

the applicant: **CROSS Zlín, a. s.**

[…]

v

the defendant: **Úřad pro ochranu hospodářské soutěže (Office for the Protection of Competition)**

[…] with the intervention of: **Statutární město Brno (Self-governing City of Brno)**

[…] **with respect to an application challenging the decision of the Defendant's Chairman of 9 November 2020, ref. no. ÚOHS- 34854/2020/321/ZSř,**

as follows:

I. The following question is hereby submitted to the Court of Justice of the European Union for a preliminary ruling:

Is it compatible with Articles 2(3) and 2a(2) of Directive 89/665/EEC, interpreted in the light of Article 47 of the Charter of Fundamental Rights of the EU, for Czech legislation to permit a contracting authority to conclude a public contract before an action is brought before a court competent to review the legality of a second-instance decision of the Úřad pro ochranu hospodářské soutěže (Office for the Protection of Competition) to exclude a tenderer?

II. […]

Grounds:

I. Subject of the proceedings

1 In the present case, the contracting authority, the Statutární město Brno (Self-governing City of Brno), launched an open tender on 27 September 2019 in order to award a public contract titled 'ROZŠÍŘENI FUNKCÍ DOPRAVNÍ ÚSTŘEDNY SSZ' (Extension of the functions of the light signalling equipment traffic control centre) published in the Věstník veřejných zakázek ('Public Contracts Register') under no. Z2019-034002 and in the Official Journal of the European Union under reg. no. 2019/S 190-461538. The subject of the public contract was to be an extension of the existing traffic control room and of the services provided, consisting of the connection of all of the contracting authority's light signalling equipment (LSE) to the traffic control room; of the linking of the traffic control room to the DIC 2 Brno system; of the linking of the traffic control room with the city camera system, of technical support, operator training, and of a prophylactic service. The expected value of the public contract was CZK 13,805,000, excluding VAT.

2 By the set deadline, the contracting authority had received two tenders for the public contract: the tender of the applicant, CROSS Zlín, a. s., with the lowest tender price, and the tender of Siemens Mobility, s. r. o., with the second lowest tender price. According to the tender documentation, the financial advantageousness of the tenders was evaluated on the basis of the lowest tender price. In its notice of 6 April 2020, the contracting authority excluded CROSS Zlín due to its failure to meet the tender conditions. Subsequently, on 7 April 2020, Siemens Mobility was chosen as the supplier. CROSS Zlín lodged objections against the notice of elimination, which the contracting authority rejected by a decision of 4 May 2020. Subsequently, CROSS Zlín applied to the Office for the Protection of Competition ('the Office') for a review of the actions of the contracting authority, seeking the annulment of the notice of its elimination and of the selection of Siemens Mobility as the supplier. In administrative proceedings before the Office, an interim measure was ordered ex officio on 3 July 2020, prohibiting the contracting authority from entering into an agreement

for the public contract until the final conclusion of the administrative proceedings. By a decision of 5 August 2020, the Office rejected the application. CROSS Zlín lodged an administrative appeal (*rozklad*) challenging the first-instance decision, which the Chairman of the Office rejected by his decision of 9 November 2020, confirming the first-instance decision. That decision became final on 13 November 202[0]. On 18 November 2020, the Office entered into an agreement for the public contract with the selected tenderer.

3 On 13 January 2021, the applicant CROSS Zlín filed an action with the Brno Regional Court, challenging the decision of the defendant's Chairman. Simultaneously with the action, it applied for suspensive effect of the action and the issuance of an interim measure consisting of a prohibition on the contracting authority concluding the public contract, or, more precisely, a prohibition on performing the agreement. By an order of 11 February 2021, the court rejected the application for suspensive effect as well as for the issuance of the interim measure, stating that, if the agreement had already been entered into, it made no sense to impose on the contracting authority a prohibition to enter into the agreement. Even if the action were successful and the court were to annul the decision of the defendant's Chairman, the Office would discontinue the proceedings after the case was returned, with a reference to Paragraph 257(j) of Zákon č. 134/2016 Sb., o zadávání veřejných zakázek (Law 134/2016, on public procurement), and would not examine the case itself. According to the court, it would not be possible to impose on the contracting authority the prohibition to perform the agreement, as, at that point in time (after the decision of the Office Chairman had become final), the conclusion of the agreement was not prevented by any legal obstacle.

4 By its letter of 28 March 2022, the court informed the parties that it was considering making a preliminary reference, giving them a period to make a statement with respect to the procedure. On 8 April 2022, the defendant informed the court that it would make a detailed statement with respect to the court's proceedings only in the preliminary reference proceedings, should they be commenced. In its statement of 26 April 2022, the applicant noted that it had attempted to prevent the conclusion of the agreement for the public contract in vain, after the defendant's decision became final, by an application for an interim measure. The conclusion of agreements for public contracts after the defendant's decisions become final is an established practice of contracting authorities which infringes on the rights of the excluded tenderer to effective legal protection and due process. Hence, it had no objections against the making of the preliminary reference. It did, however, state that the situation could be resolvable if the defendant, in proceedings concerning the review of the contracting authority's actions, issued an interim measure pending the expiry of the period for the lodging of an action in administrative proceedings. […]

II. Applicable EU and national legislation

5 Pursuant to Article 1(3) of Directive 89/665/EEC, Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

6 Furthermore, it follows from Article 2(3) of Directive 89/665/EEC that when a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

7 Article 2a(1) of Directive 89/665/EEC stipulates that Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

8 Pursuant to Article 2a(2) of Directive 89/665/EEC, a contract may not be concluded following the decision to award a contract falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision. Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

9 Pursuant to Article 47(2) of the Charter of Fundamental Rights of the EU, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended, and represented.

10 Protection against improper procedure of the contracting authority is regulated on the national level in Part 13 of Law 134/2016, on public procurement. Objections against the contracting authority’s procedure may be lodged within 15 days of the date on which the complainant learns of the breach of the law by the contracting authority (Paragraphs 241 and 242 of the Law).

11 Pursuant to Paragraph 245(1) of Law 134/2016, the contracting authority shall send the decision concerning the objections to the complainant within 15 days of service of the objections. In its decision, it shall state whether it accepts or rejects the objections; the decision shall contain the rationale in which the contracting authority makes a detailed and comprehensible statement concerning all facts set out in the objections by the complainant. If the contracting authority accepts the objections, it shall also state in its decision what remedial measures it will take.

12 Furthermore, it follows from Paragraph 245(4) of Law 134/2016 that, if the contracting authority rejects the objections, it shall inform the complainant in its decision concerning the objections about the possibility to lodge with the Office, within the period specified in Paragraph 251(2), an application for the initiation of proceedings to review the actions of the contracting authority, and about the obligation to deliver one counterpart of the application to the contracting authority within the same period.

13 The provisions of Paragraph 246(1) of Law 134/2016 provide that the contracting authority may not conclude a contract with a supplier: (a) before the expiry of the time limit for lodging objections against a decision to exclude a tenderer from a tendering procedure, to select a supplier, or against an act of voluntary notification of an intention to conclude a contract; (b) until the delivery of a decision on objections to the complainant, if objections have been lodged; (c) before the expiry of the time limit for submitting an application for initiation of proceedings to review the actions of the contracting authority, if the objections lodged have been rejected; (d) within 60 days of the day of the initiation of proceedings to review the actions of the contracting authority, if the application for the initiation of proceedings was lodged in a timely fashion. The contracting authority may, however, enter into the contract during this period, if the Office has rejected the application or the administrative proceedings concerning the application have been discontinued and such decision has become final. Pursuant to subparagraph 2 of the above provision, the contracting authority must also not conclude a contract with a supplier within 60 days of the day of initiation of the proceedings to review the actions of the contracting authority, if the Office initiates such proceedings ex officio; however, the contracting authority may enter into the contract during this period if the administrative proceedings have been discontinued and such a decision has become final.

14 It follows from Paragraph 254(1) of Law 134/2016 that an application to impose a prohibition on the performance of a public contract may be filed by an applicant who claims that the contracting authority has entered into the contract: (a) without prior publication […]; (b) despite a prohibition on its conclusion laid down in this Law or by an interim measure; (c) on the basis of a procedure outside of the tendering procedure, […]; or (d) by proceeding pursuant to Paragraph 135(3) or Paragraph 141(4) […].

15 The provisions of Paragraph 264(1) of Law 134/2016 stipulate that the Office shall impose on a contracting authority in a tendering procedure, based on an

application pursuant to Paragraph 254, a prohibition on the performance of a contract, if the public contract or general agreement was concluded by the procedure stipulated in Paragraph 254(1). A contract in respect of which the Office imposed a prohibition on performance without proceeding pursuant to subparagraph 3 shall be void *ab initio*. Subparagraph (2) of the said provision stipulates that an agreement for the performance of a public contract shall become void due to a breach of this Law solely in cases when the Office imposes a prohibition on its performance pursuant to subparagraph (1). Invalidity due to other reasons shall not be prejudiced.

16 Pursuant to Paragraph 257(j) of Law 134/2016, the Office shall discontinue proceedings by an order if, during the administrative proceedings, the contracting authority concluded a contract for the performance of the subject of the public contract under review.

17 Pursuant to Paragraph 61 of Zákon č. 500/2004 Sb., správní řád (Law 500/2004, the Administrative Code), an administrative authority may, ex officio or on the application of a party lodged before the conclusion of proceedings, order an interim measure, if it is necessary to regulate the position of the parties in a temporary manner […]. An interim measure may order a party or another person to act, refrain from acting, or tolerate an action, or secure an item that may serve as evidence or an item that may be the subject of execution (subparagraph (1)). A decision on a party's application for an interim measure shall be made within 10 days. The decision shall be notified only to the parties concerned, or also to another party that had requested its issuance. An appeal challenging a decision ordering an interim measure does not have a suspensive effect; it may be lodged only by a party to which the decision is to be notified (subparagraph (2)). The administrative authority shall annul the interim measure by an order immediately upon the cessation of the reason due to which it was ordered. If it fails to do so, the interim measure shall cease to apply on the day when the decision on the merits of the case has become enforceable or otherwise becomes final (subparagraph (3)).

18 It follows from Paragraph 38 of Zákon č. 150/2002 Sb., soudní řád správní (Law 150/2002, the Code of Administrative Procedure) that, if an application for the initiation of proceedings has been filed and the situation of the parties must be temporarily regulated due to the threat of serious harm, the court may order, on the basis of an application, an interim measure imposing an obligation on the parties to act, refrain from acting, or tolerate an action. On the same grounds, the court may also impose such an obligation on a third party, if it can be justly demanded of the party (subparagraph (1)). With respect to an application for an interim measure, the court shall request statements of other parties as required (subparagraph (2)). The court shall decide about an application for an interim measure without undue delay; if there is no risk related to delay, it shall decide within 30 days of the application. An order concerning an application for an interim measure shall always be supported by rationale (subparagraph (3)). The court may annul or amend an order concerning an interim measure if the situation

changes and may do so even without an application. An interim measure shall expire no later than on the day when the decision of the court ending the proceedings has become enforceable (subparagraph (4)).

19 Pursuant to Paragraph 72(1) of Law 150/2002, an action may be filed within two months of the notification of a decision, by means of the delivery of a written version of the decision or by other means stipulated by law, unless the law provides for another period.

20 It follows from Paragraph 78(1) of Law 150/2002 that, if the action is well-founded, the court shall annul the challenged decision due to its being unlawful or due to defects in the proceedings. A court shall also annul a challenged decision due to its being unlawful should it learn that an administrative authority has exceeded or abused the set limits of administrative discretion. Subparagraph (4) stipulates that, if a court annuls a decision, it shall also state that the case is being returned to the defendant for further proceedings.

III. Analysis of the preliminary reference

21 In the case at hand, the court questions whether the Czech legislation complies with the requirements of Directive 89/665/EEC and with the requirement of ensuring effectiveness of judicial review arising from Article 47 of the Charter of Fundamental Rights of the EU, given that it permits a contracting authority to conclude a public contract before the commencement of judicial review of the Office's decision on an administrative appeal or, more precisely, before a court can decide about the issuance of an interim measure prohibiting the contracting authority from entering into the contract before the decision on the action becomes final.

22 If a tenderer is excluded in a tendering procedure, as was the case in the case at hand, a standstill period of 60 days shall run during the proceedings concerning the application of the excluded tenderer, during which the public contract cannot be concluded (Paragraph 246(1)(d) of Law 134/2016). The Office may further extend the period by issuing an interim measure under Paragraph 61 of Law 500/2004, consisting of imposing a prohibition on the contracting authority from concluding the public contract before a final decision of the Office on the application. The interim measure shall expire no later than upon the decision on the administrative appeal becoming final. Once the decision of the Office Chairman on the administrative appeal becomes final, the contracting authority is no longer in any way prevented from concluding the public contract. Hence, situations frequently occur when a contracting authority concludes a public contract before the decision of the Office's Chairman concerning an administrative appeal is challenged by an action lodged with a court. An action may be lodged with an administrative court within two months of the delivery of the second-instance administrative decision to the applicant (Paragraph 72(1) of Law 150/2002) and it may be linked with an application for an interim measure

consisting of the imposition of a prohibition on the contracting authority from concluding the public contract for the duration of the judicial proceedings. Before an action is filed, it is not possible to seek an interim measure (Paragraph 38 of Law 150/2002).

23 If the public contract is concluded prior to the lodging of an action linked with an application for an interim measure, the court shall not, according to established case-law, issue an interim measure, since, in such a situation, there is no longer any need to provisionally regulate the parties' situation (see, e.g., order of the Brno Regional Court of 26 November 2020, ref no. 30 Af 66/2020-88). If the court finds that the Office erred in its assessment of the legality of the exclusion of the tenderer, it shall annul the Office's decision as illegal and refer the case back to the Office for further proceedings (Paragraph 78(1) and (4) of Law 150/2002). However, if the public contract has already been concluded, the Office shall not re-examine the merits of the application for review of the contracting authority's actions in accordance with the court's findings after the court has returned the case for further proceedings, but shall discontinue the proceedings on the application, with a reference to Paragraph 257(j) of Law 134/2016. Thus, a situation may occur where the court concurs with the argumentation of the excluded bidder that the contracting authority's procedure, in terms of its exclusion, was unlawful, and annuls the Office's second-instance decision as illegal, but the excluded bidder will no longer have a chance to win the public contract, as, in the interim, the public contract was concluded, in the period between the Office's decision on the administrative appeal becoming final and the court's possible decision to issue an interim measure for the judicial proceedings. According to Czech law, such a tenderer is then entitled only to seek compensation for damages caused by the unlawful steps taken by the contracting authority, in proceedings before the civil courts under Zákon č. 99/1963 Sb., občanský soudní řád (Law 99/1963, Code of Civil Procedure). The unlawfully excluded tenderer will, however, only be successful in the damages proceedings if it proves: (1) the unlawful conduct of the contracting authority, (2) the occurrence of damage, (3) a causal connection between the unlawful conduct of the person who caused the damage and the occurrence of the damage and, where applicable, (4) fault on the part of the person who caused the damage, pursuant to Paragraph 2911 of Zákon č. 89/2012 Sb., občanský zákoník (Law 89/2012, the Civil Code) (even though it can be stated, with reference to the CJEU judgment of 30 [September] 2010, in *Stadt Graz* C-314/09, that in the case of damages for breach of public procurement law, the contracting authority will be automatically liable for such damages). In practice, it is often difficult for the unlawfully excluded tenderer to prove the occurrence of actual damage and the causal connection between the unlawful conduct of the contracting authority and the damage, as it does not suffice to prove the mere possibility of the occurrence of damage due to the unlawful conduct of the contracting authority, but the reality of the damage and the causal connection must be established with certainty.

24 Czech legislation considers the Office to be the 'competent review body', as defined in Directive 89/66[5]/EEC. This is documented by the text of

Paragraph 246 of Law 134/2016 which lays down time limits that prevent the contracting authority from concluding a contract during the proceedings before the Office. Nevertheless, the Office cannot be considered an independent and impartial tribunal established by law under Article 47 of the Charter.

25 In its judgment of 21 December 2021 in *Randstad*, C-497/20, paragraph 73, the Court of Justice of the European Union ('CJEU') stated that Article 2a(2) of Directive 89/665/EEC must be interpreted in light of Article 47, second paragraph, of the Charter. In that situation, according to the CJEU, an 'independent review body', as provided for in Article 2a(2) of Directive 89/665/EEC, shall, for the purpose of determining whether a tenderer's exclusion has become final, mean an independent and impartial tribunal previously established by law, within the meaning of Article 47 of the Charter.

26 The necessity of interpreting the term 'independent review body' in light of Article 47 of the Charter also follows from the CJEU judgment of 15 September 2016 in *SC Star Storage SA*, C-439/14 and C-488/14, concerned with the interpretation of Directive 89/665/EEC and Council Directive 92/13/EEC coordinating the laws, regulations, and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. Paragraph 41 of the judgment states that the objective of the directives is '*to reinforce the existence, in all Member States, of effective remedies, so as to ensure the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified'*. According to the CJEU: *'[for] candidates and tenderers harmed by the decisions of contracting authorities, the Member States must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter'*.

27 If it held true that the independent review body under Article 2a(2) and Article 2(3) of Directive 89/665/EEC must be an independent court, the Czech legal regulation which permits the conclusion of a public contract immediately after the decision of the Chairman of the Office concerning an administrative appeal becomes final, i.e., before the commencement of proceedings before a court established pursuant to Article 47 of the Charter, would run contrary to Article 2a(2) of Directive 89/665/EEC and would not provide to excluded tenderers effective judicial review. The requirement of an effective remedy embodied in Article 47 of the Charter arises both from paragraphs 57-58 of the judgment in *Randstad* and, for example, from the CJEU's judgment of 17 July 2014 in *Sánchez Morcillo and Abril García*, C-169/14, paragraphs 35-36.

28 An assessment of the compliance of the Czech legal regulation with the requirements of Directive 89/665/EEC is determinative of the court's procedure in reviewing the legality of the decision challenged by the action. If the CJEU found inadequate implementation of the Directive by the Czech legislators, the court deems that it would be obliged – should it find the challenged decision to be illegal – to bind the Office in its judgment, by its binding legal opinion leading to

the abandonment of the application of those provisions of national law that result in that breach (see the CJEU judgment of 18 May 2021 in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociatia 'Forumul Judecâtorilor din România' and Others v. Inspectia Judiciarâ and Others*, paragraphs 250-251). In the case at hand, the only sensible consequence respecting the principle of effective judicial review would seem to be for the Office, once its decision is annulled as illegal in judicial proceedings and referred for further hearing, to cease to apply the rule on the possibility of discontinuing the proceedings due to the conclusion of the public contract, set out in Paragraph 257(j) of Law 134/2016, and to view the contract concluded prior to the lodging of the action as invalid and impose a prohibition on its performance, with the *mutatis mutandis* application of Paragraph 254(1)(b) in conjunction with Paragraph 264(1) and (2) of Law 134/2016. Then the Office would reassess the legality of the exclusion of the tenderer in line with the binding legal opinion of the court. This way, the applicant would retain the possibility of succeeding in the public tendering procedure.

IV. Conclusion

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